Supreme Court, U.S.
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No. 92-1741

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ALPINE LAND AND RESERVOIR COMPANY,
petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for Writ of Certiorari to
United States Court of Appeals
for the Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States' failure to adhere to a long-standing agreement to abide by historical practices and customs of water distribution constitutes extraordinary circumstances justifying relief under Fed.R.Civ.P. 60(b)(6).

2. Whether the Court of Appeals improperly substituted its view of the facts for the District Court's findings of fact on the issue of exceptional circumstances.

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ISSUES ADDRESSED

The Brief for the United States in Opposition filed in this proceeding raises an issue entirely different from the issues stated in Alpine Land and Reservoir Company's ("Alpine") Petition for Writ of Certiorari. Compare Pet.App. i, with Resp.Opp. I. The United States then argues the law applicable to its chosen issue as applied to the "facts" of the case, while ignoring the essential issue, which is whether the Court of appeals improperly substituted its version of the facts for the District Court's findings of fact. In accordance with Supreme Court Rule 15.6, this Reply discusses matters first raised by the United State's "restatement" of the issue and attempts to refocus the issues.

DISCUSSION

The Ninth Circuit Court of Appeal's reversal of the District Court's Decision dated August 1, 1991 is based upon findings of fact,

not law, yet it made no finding that the District Court findings of fact were clearly erroneous. The Court of Appeals simply substituted its findings of fact for Judge Thompson's. The United States has, inaccurately, framed the focus of this Petition as an issue of law.

1. The parties agree that relief under Rule 60(b)(6) is available only when relief under subdivisions (1) through (5) of Rule 60(b) is not available and when "exceptional circumstances" exist. See Resp.Op. 5-6. The United States suggests[1] that Rule 60(b)(1) relief may have been appropriate in this case, but does not contend that Rule 60(b)(1) is exclusively applicable or show why this would be so. The Court of Appeals' Opinion[2] also suggests that Rule 60(b)(1) "might have been the basis for relief pursuant to Rule 60(b)(1)...",

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[1] Resp.Op. 8-9 n. 5.

[2] Pet. App. 12A.

but does not explain why this is so. Judge Thompson specifically ruled that Rule 60(b)(1) was not applicable. Pet. App. 9B-10B. Consequently, the only pertinent factual inquiry concerns whether Judge Thompson's finding that "exceptional circumstances" exist was clearly erroneous.

The District Court specifically found that exceptional circumstances did exist. Pet. App. 16B. The Court of Appeals did not find that the District Court misperceived or misapplied the law or that it failed to make findings of fact essential to a proper resolution of the legal question. Regardless of the arguments for reversing the District Court set forth in the Court of Appeals' Opinion, the reversal could only be based upon a finding that the District Court's findings of fact were "clearly erroneous." See Icicle Seafoods, Inc. v. Worthington, 475 U.S. 709, 714 (1986). The Court of Appeals found: "[t]hose circumstances do not exist in this case." Pet. App. 12A. It

did so without making a specific finding and stating its reasons therefore why the District Court's Decision was "clearly erroneous" and without making any reference to the applicable standard on appeal set forth in Rule 52(a).[3]

Federal courts of appeal are to review factual findings for clear error. See, e.g., United States v. Taylor, 487 U.S. 326, 337 (1988); Simon v. Intercontinental Transport, 882 F.2d 1435, 1439 (9th Cir. 1989). The Court has granted certiorari in a case very similar, in terms of the procedural issues raised, to the present case. See Icicle Seafoods, Inc. v. Worthington, 475 U.S. 709 (1986). In Icicle, the Court granted certiorari to consider whether the court of appeals applied the appropriate standard of review in passing on the district

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[3] Fed. R. Civ. Proc. 52(a) reads, in relevant part, "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

court's judgment. Id. at 710. The Ninth Circuit Court of Appeals had reversed the district court's findings of fact. Id. The Court of Appeals proposed to "apply a de novo standard of review to the application of exemption to the facts and to review the facts under a clearly erroneous standard." Id. at 713 (quoting 774 F.2d at 352, citing United States v. McConnery, 728 F.2d 1195, 1202 (9th Cir.)(en banc), cert. denied, 469 U.S. 824 (1984)). Finding that the questions presented were questions of fact, as they are in the present case, the Court vacated the Court of Appeals' judgment and remanded for further proceedings. Id. at 715.

The Court held that the following options are available the courts:

> If the Court of Appeals believed that the District Court had failed to make findings of fact essential to a proper resolution of the legal question, it should have remanded to

> the District Court to make those findings. If it was of the view that the findings of the District Court were "clearly erroneous" within the meaning of Rule 52(a), it could have set them aside on that basis. If it believed that the District Court's factual findings were unassailable, but that the proper rule of law was misapplied to those findings, it could have reversed the District Court's judgment. But it should not simply have made factual findings on its own.

Id.

The Court of Appeals has done exactly what the Court instructed it not to do in Icicle, it has made its own findings of fact. This is the primary issue raised by this petition. The Court has previously granted certiorari in cases raising questions similar to those presented in

this Petition.[4]

2. The United States claims that the arguments regarding the government's agreement to abide by historical practices and customs were not raised below. This is not so. This argument was fully briefed and argued in connection with Alpine's petition for rehearing to the Court of Appeals.

3. The United States has argued that "finality concerns" militate against the relief requested. Resp.Op. 7. The purpose of finality is reliance. Here, that purpose is served better by Alpine's requested relief than by the United State's insistence on the technical terms of the Final Decree, since the reservoirs have been managed according to the amounts Alpine wants the Court to recognize, for many years, and since entry of the decree at the requested

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[4] See, e.g., Dennison Mfg. Co. v. Panduit Corp., 475 U.S. 809 (1986); Icicle, 475 U.S. 709 (1986).

storage capacities would not effect a change. Alpine is simply asking that practice be recognized (as was the government's agreement). The United States is asking for a change in the status quo. Contrary to the United States' assertion, it's representative, the Water Master, was charged with regulating the flow of water and, therefore, had to know the amount of water being used. Thus, maintaining the status quo does not result in unfairness to the United States. The Court has previously stated that the parties' course of conduct under a water rights decree may be relevant. See Nebraska v. Wyoming, 507 U.S. ____, 113 S.Ct. ____, 123 L.Ed. 2d 317, 330 (1993). Course of conduct here graphically illustrates unfairness to Alpine.

CONCLUSION

A decision for the United States in this case deprives Alpine of water storage which it bought, paid for, and relied upon for decades.

Four of Alpine's eight reservoirs are affected by the outcome of this case. The many exceptional circumstances cited by the District Court justify the relief Alpine seeks under Rule 60(b)(6).

The Court of Appeals failure to find that the District Court's Decision was clearly erroneous or state why it was clearly erroneous supercedes consideration of the merits of the issue raised by the United States. The fact that the Court of Appeals substituted its view of the facts for the District Court's findings of fact on the issue of exceptional circumstances constituted clear error and warrants the Court's granting certiorari.

DATED: This _____ day of August, 1993.

Respectfully submitted,

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